No. 410

IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

TRAILWAYS OF NEW ENGLAND, INC., *Petitioner*,

v.

AMALGAMATED ASSOCIATION OF STREET, ELECTRIC RAILWAY AND MOTOR COACH EMPLOYEES OF AMERICA, AFL-CIO, DIVISION 1318

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

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BRIEF FOR RESPONDENT IN OPPOSITION

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BRIEF FOR RESPONDENT IN OPPOSITION

QUESTION PRESENTED

The Union and the Company are parties to a collective bargaining agreement providing for the submission to final and binding arbitration of all unsettled grievances arising thereunder, including those relating to the discipline and discharge of employees. The

question presented is whether the Company can escape its contractual duty to arbitrate discharges resulting from a strike on the ground that the strike was a material breach and repudiation of the agreement and an arguable violation of Section 8(d) of the National Labor Relations Act, as amended.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act are set forth at pp. 3-5 of the petition.

STATEMENT

In the period between August and December 1963, differences arose between the Company and the Union as to whether their agreement, due to expire on February 4, 1964, should be interpreted and applied to require bus operators represented by the Union to carry "standees" in the various states served by the Company. (Pet. 2a, U.A. 22-23, R. 8, 18)[1] Letters were sent by the Union to the State regulatory commissions requesting information as to each State's rules and regulations regarding "standees" and inquiring as to the Company's compliance with these legal requirements (R. 18, 35). In this same period, on November 21 and 27, 1963, respectively, the Union and the Company were preparing to open negotiations for a new agreement by serving upon each other the notices required by section 8 (d) of the National Labor Relations Act (Pet. 3a). The parties planned to meet in January 1964 to resolve any outstanding grievances and to exchange their contract proposals (R. 79, 80).

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[1] "Pet.", "U.A." and "R." refer, respectively, to the Petition, Union's Appendix printed at the back of its brief to the court of appeals and Company's Appendix.

On December 10 and 11, 1963, the Union transmitted to all operators and to the Company the results of the Union's survey of State laws on the subject of standees (Pet. 3a, U.A. 22-23, R. 18). The Union's letter to the Company stated that any differences of opinion between operators and supervisors as to whether standees should be carried could now be brought out in the open and resolved in a proper manner. The Company's only response to this letter was to set it aside for discussion at the parties' January meeting (Pet. 3a, R. 75).

On December 29, 1963, operator Paine, a Union member, was removed from service for failing to comply with a Company order to carry standees in Connecticut while lacking the special permit required by the law of that State for the transportation of standing passengers (Pet. 2a).[2] Paine was given a 30-day suspension for this alleged "insubordination" on December 31, 1963 (R. 9, 24, 32).

In protest of the disciplinary action taken by the Company, each of the union drivers in turn refused to pull his trip (Pet. 2a, R. 32). The Company accused the Union of refusing to follow the grievance procedure and issued warnings that the Company considered any refusal to work a violation of the contract and cause for discharge. Virtually the entire work force of the Company numbering approximately 190 operators and terminal employees was ultimately discharged for alleged participation in an unlawful strike. The employees received written notice of their discharge by letters

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[2] The reply of the Connecticut Public Utility Commission to the Union's inquiry had stated that the Company was not licensed to carry standees in Connecticut (R. 35).

dated January 6 and 8, 1964, respectively (Pet. 3a, R. 28, 30-31).

Meanwhile, however, the Company filed a grievance under the contract for damages resulting from the strike, dated January 6, 1964, which it later abandoned (U.A. 25, R. 39-40). On January 7, 1964, the Union filed a grievance protesting Paine's suspension (Pet. 2a, R. 19). The Company denied this grievance on its merits by letters dated January 14 and 27 (Pet. 2a, R. 20, 21).[3] The instant grievance protesting the employees' discharge was filed on January 14, 1964 (Pet. 3a, R. 22). On the same date, the Company purported to terminate the contract retroactive to December 31, 1963 as a result of the strike and thereafter refused to process the grievance of the discharged employees (R. 23, 11, 25). The Union then brought this suit to compel arbitration.

The decision of the district court (R. 55-59) held that the Company could not be released from its contractual duty to arbitrate on the ground that the strike allegedly constituted an unfair labor practice and a major breach of the agreement, relying upon this Court's decisions in *Packinghouse Workers* v. *Needham*, 376 U.S. 247, *Drake Bakeries Inc.* v. *Bakery Workers*, 370 U.S. 254 and *Smith* v. *Evening News Assn.*, 371 U.S. 195.

The court of appeals unanimously affirmed the district court's decision, concluding that in view of this Court's rejection of the same argument in *Needham*, 376 U.S. at 251, the Company could not successfully justify its refusal to arbitrate on the ground that

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[3] Petitioner has chosen not to challenge the judgments below insofar as they order the Company to arbitrate the Paine grievance (Pet. 7, n. 3, 7a, R. 60).

the strike was a material breach and repudiation of the agreement. The court further stated that it would not be in keeping with (Pet. 6a)

> the preferred position attached by the [Supreme] Court to labor arbitration were we to allow an employer to escape its duty to arbitrate whenever it can work out a theory that a particular strike may have been an unfair labor practice. We, therefore, hold that an employer must arbitrate grievances arising from the discharge of strikers even where the strike may have been an unfair labor practice in violation of section 8(d). We decline to decide whether the same result would obtain where a strike was admittedly or clearly a violation of 8(d).

Chief Judge Aldrich, concurring, noted that the court was expressing no opinion on the question whether, if a strike was an unfair labor practice, it would be contrary to the provisions of the Act, to foreclose by contract an employer's right to take the discharge action contemplated by Section 8(d)(4).

ARGUMENT

No issue warranting review by this Court is presented. This case raises no question of general importance. The decision below is so plainly correct and in accord with principles of law enunciated by this Court and with the decisions of other courts that there is no reason for granting the petition.

I. This Case Has No General Importance

The first question stated in the Petition, whether a strike in violation of Section 8(d) of the Labor Management Relations Act prevents the Union from arbitrating discharges resulting from the strike, is not

involved in this case, and was not decided, or required to be decided, by the court below. The record and decision below will be searched in vain for any finding that the strike was, in fact, within the prohibition of Section 8(d). Indeed, the Petition itself concedes that the court below, in declining to determine in the first instance whether the facts of this case presented more than an arguable violation of Section 8(d), "failed to meet the issue directly" (Pet. 9). Hence, Petitioner's theory that a novel and substantial issue of statutory construction is presented by the decision below, is entirely predicated upon an unsupported premise. Whatever may be the significance of the Section 8(d) issue to the federal labor policy, it is not properly before the Court upon this Petition.[4]

Moreover, the second issue stated by the Petition, that the decision below conflicts with this Court's decisions in *Drake Bakeries, Inc.* v. *Bakery Workers,* 370 U.S. 254 and *Packinghouse Workers* v. *Needham,* 376 U.S. 247 reduces to a purely factual claim that the particular circumstances of this case show either a repudiation of the agreement to arbitrate, or a fundamental and long-lasting change in the parties' relationship, sufficient to distinguish those decisions (See discussion, *infra,* pp. 12-13). Accordingly, this aspect of the Petition likewise presents no issue of general importance warranting review.

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[4] Assuming that such a question "abstractly considered, • • • may present an intellectually interesting and solid problem • • • this Court does not sit to satisfy a scholarly interest in such issues. *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74.

II. The Decision Below Is Obviously Correct

The only remaining thrust of the Petition is that this case was wrongly decided below and should be reversed for the benefit of Petitioner. It completely answers such assertions simply to state that even if this particular decision were in error, "this Court does not sit for the benefit of particular litigants." *Rice* v. *Sioux City Cemetery,* 349 U.S. 70, 74. Whenever, as in this case, "review would be of no importance save to the litigants themselves", the writ of certiorari should not be granted. *Rudolph* v. *United States,* 370 U.S. 269, 270.

In addition, however, the holding below that a claim within the scope and coverage of an arbitration agreement is no less arbitrable because it arises out of conduct which may be both violative of the contract and prohibited by the National Labor Relations Act, is fully consistent with principles which this Court has repeatedly employed to determine the arbitrability of disputes.

1. The recent cases of this Court leave no doubt that the ultimate question of arbitrability to be decided by the courts under Section 301 in no way depends in its resolution upon whether the subject matter of the grievance involves conduct forbidden by that statute. The matters in dispute are referrable to arbitration under the contract even though the underlying activity is arguably protected or prohibited by the Act. *Smith* v. *Evening News Assn.,* 371 U.S. 195, 197; *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95, 101 n. 9; *Atkinson* v. *Sinclair Refining Co.,* 370 U.S. 237, 246 n. 5; *Dowd Box Co.* v. *Courtney,* 368 U.S. 502; *Humphrey* v. *Moore,* 375 U.S. 335, 84 S. Ct at p. 369; cf. *Carey*

v. *Westinghouse Electric Corp.*, 375 U.S. 261, 84 S. Ct. 401, 407.

Manifestly, petitioner's argument that the court below should have declared the contractual right to arbitrate nullified by Section 8(d) violations misconceives the authority of the courts in determining questions of arbitrability. Their duty is to enforce the parties' agreement even though the conduct involved may also be an unfair labor practice. The authority to deal with an unfair labor practice which may also be a contract violation lies with the Labor Board. *Smith* v. *Evening News Assn., supra,* 371 U.S. at 197. Hence, the Court below was clearly right to refrain in the first instance from interpreting Section 8(d) or deciding the application of that section to the facts of this case. Just as the Labor Board is "so severely * * * limited to the adjudication of statutory rights that it has no power to adjudicate contractual disputes," so the courts and arbitrators in enforcing the private contractual undertakings of the parties have no primary jurisdiction to determine the statutory rights and duties of the parties under the provisions of the Act. See, *Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F. 2d. 147, 152 (C.A. 5), cert. den. 379 U.S. 991.

Another error in petitioner's argument lies in its failure to recognize that not every strike which occurs during the 60-day period prior to expiration of a collective bargaining agreement is prohibited by Section 8(d). Thus, the Court below, although correctly deciding that it need not resolve the Section 8(d) issue, properly pointed out that the provisions of Section 8(d) have never been interpreted to proscribe all strikes by a party seeking termination or modification

of a pre-existing agreement. *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270, 286; *Local Union 9735* v. *N.L.R.B.*, 258 F. 2d 146 (C.A.D.C.) *Mile Branch Coal Co.* v. *U.M.W.*, 286 F. 2d 822 (C.A.D.C.), cert. den. 365 U.S. 871. Petitioner's assertion (Pet. 12) that on this point the decision below conflicts with decisions of the Eighth and District of Columbia Circuits, does not find support in the cases cited. The cases relied upon merely recite the language of the statute and hold that where a strike prior to expiration of the statutory notice period, does in fact seek to obtain a new contract or modifications in the existing agreement, rather to enforce the agreement as written, a violation of Section 8(d) is committed which causes the strikers to lose the protections of Section 8, 9 and 10 of the Act.

Section 8(d) causes employees who participate in a strike during the sixty-day notice period to forfeit their status only when recourse to strike action is for the purpose of effecting changes in existing contract terms. The statutory scheme is based on the theory that a sixty-day period of uninterrupted negotation, with the help when necessary of Federal and State conciliators, will produce agreement without the need for recourse to industrial strife. Resort to a strike or lockout to compel one party to accede to the contract demands of the other is enjoined before the expiration of the sixty days allotted to effect agreement without self help. "Section 8(d) thus seeks during this natural renegotiation period, to relieve the parties from the economic pressure of a strike or lockout *in relation to the subjects of negotiation*" [emphasis added] *Mastro Plastics Corp.* v. *N.L.R.B.*, *supra*, 350 U.S. at 286. This Section does not apply unless the object of the strike is "to

modify the terms of the agreement." *Local Union 9735* v. *N.L.R.B., supra,* 258 F. 2d at 149.[5]

In any event, nothing in the language or logic of Section 8(d) supports the further essential assumption of petitioner's argument that the effect of a violation must be not only to divest strikers of their statutory protections but also to destroy their private contractual right to have their grievances arbitrated. Because the issues and problems presented "are not at all alike," an employer may be entirely free under Section 8(d) to discharge employees who engage in a work stoppage to obtain modification of a contract during the 60-day period to its expiration without in the least foreclosing the Union from enforcing in an arbitration proceeding the private "*contractual* right of employees not to be discharged 'unjustly'." See, *Steelworkers* v. *American Int'l Aluminum Corp., supra,* 334 F. 2d 147, 152; *Fibreboard Paper Products* v. *Machinists,* 344 F. 2d 300, 305 (C.A. 9). If, upon arbitration, the discharge penalty proves too severe or discriminatory in its application, such employees may be ordered reinstated. See, e.g. *Borden Chemical Co.,* 34 LA 325 (Wallen); *Glass Container Manufacturers Institute,* 27 LA 131 (Lehoczky); *Lone Star Steel Co.,* 30 LA 519 (Kelli-

[5] Although properly irrelevant to the issues here, the court below aptly observed that it is "by no means clear" that the question of standees was so related to negotiations for a new contract that the strike protesting the suspension of Operator Paine must be considered a strike to terminate or modify the existing contract, prohibited by Section 8(d) (Pet. 5a). The violation of this Section is no more than "arguable" because it appears from the only evidence submitted that the Union was protesting the employer's refusal to comply with his existing contractual commitments and with the applicable provisions of State law concerning the transportation of standees rather than seeking changes in the contract terms. (See, pp. 2-3, *supra*).

her); *Yardley Plastics Co.*, 36 LA 280 (McIntosh); *Hooker Chemical Corp.* 36 LA 857 (Kates).

2. This Court has plainly ruled that it is no defense to the arbitrability of a claim of wrongful dismissal under an agreement to arbitrate discharges and disciplinary action that the discharge is based upon conduct constituting a major breach of the agreement. *Packinghouse Workers* v. *Needham*, 376 U.S. 247; *Drake Bakeries Inc.* v. *Bakery Workers*, 370 U.S. 254.[6] In disposing of this phase of the case, the court below was unquestionably justified in placing its principal reliance upon this Court's decision in *Needham*. That case held, in a very similar factual context, that even a strike in violation of an express no-strike clause did not relieve the employer of a contractual obligation to arbitrate discharges arising from the strike. Not only did the contract here lack the no-strike clause contained in the *Needham* agreement, but neither contract made any exception in the arbitration provision for the arbitrability of discharges arising out of strikes. Accordingly, here, as in *Needham* and *Drake*, "by agreeing to arbitrate all claims without excluding the case where the Union struck over an arbitrable matter, the parties * * * negatived any intention to condition the duty to arbitrate upon the absence of strikes."

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[6] *Accord, Steelworkers* v. *American Int'l Aluminum Corp.*, 334 F. 2d 147 (C.A. 5), cert. den., 379 U.S. 991; *I.U.E.* v. *General Electric Co.*, 332 F. 2d 485 (C.A. 2), cert. den., 379 U.S. 928; *United Textile Workers* v. *Newberry Mills, Inc.*, 315 F. 2d 217 (C.A. 4), cert. den., 375 U.S. 818; *Local 748, I.U.E.* v. *Jefferson City Cabinet Co.*, 314 F. 2d 192 (C.A. 6), cert. den., 377 U.S. 904; *Locomotive Firemen* v. *Kennecott Copper Corp.*, 338 F. 2d 224 (C.A. 10); *Minnesota Joint Board* v. *United Garment Mfg. Co.*, 338 F. 2d 195 (C.A. 8); *E. T. Simonds* v. *Hod Carriers*, 315 F. 2d 291 (C.A. 7).

Drake Bakeries Inc. v. *Bakery Workers*, *supra*, 370 U.S. at 262.

3. Petitioner's contention that the facts of this case demonstrate such a breach or repudiation of the grievance and arbitration provisions of the agreement as to bring the decision below into conflict with the qualifying language set forth by this Court in *Drake* and *Needham* turns essentially upon an appraisal of the evidence in the particular case and is, for that reason alone, without merit.[7]

Moreover, the repudiation argument here is far less persuasive than that advanced in *Needham* and *Drake* where the agreements did at least contain express no-strike provisions as well as other clauses, absent here, which indicated that the grievance and arbitration procedures were intended to be the exclusive means of settling any grievances arising under the contracts. In the absence of any showing that the employees so understood this contract, it could scarcely be said that the Union in this case, by striking over arbitrable matters, deliberately and knowingly repudiated a duty to arbitrate. In addition the instant strike protested the refusal of the Company to comply with its own contractual commitments. Seeking enforcement of the contract in these circumstances cannot reasonably be deemed a repudiation of the contract itself, or of any promise to arbitrate. Furthermore, the union in *Need-*

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[7] "[A] court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error." *Graver Mfg. Co.* v. *Linde Co.*, 336 U.S. 271, 275. "We do not grant a certiorari to review evidence and discuss specific facts." *U. S.* v. *Johnston*, 268 U.S. 220, 227.

ham waited a much longer time to invoke the grievance procedure, and the company there flatly refused to process the grievances. Here, the Company's filing of its own grievance for damages under the contract and its continued processing of the Union's grievance filed on behalf of the employee whose suspension originally precipitated the walkout convincingly demonstrate that the Company here, unlike *Needham*, did not truly regard the Union as having "repudiated and terminated the labor agreement."

Petitioner's claim that the record shows a fundamental change in the relationship of the parties prior to the arbitration demand, as premised in *Needham* (Pet. 17) has nothing to support it other than the contentions already answered (supra, pp. 7-10) that the participants in the strike lost their status as employees of the Company by operation of Section 8(d).

CONCLUSION

For the reasons stated above, the petition for a writ of certiorari should be denied.

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